JURISDICTIONAL

STATEMENT

15

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE,
Appellants,

vs.

STATE OF IDAHO

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

STATEMENT AS TO JURISDICTION

EDW. S. FRANKLIN,
WM. S. HAWKINS,
E. L. MILLER,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY,

Appellant,

vs.

STATE OF IDAHO,

Respondent

TOM E. DEANE,

Appellant,

vs.

STATE OF IDAHO,

Respondent,

PETITION FOR ALLOWANCE OF APPEAL AND JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Tom E. Dean and James Petty, respectfully pray that an order be issued out and under the seal of this Court allowing this appeal to review the decision of the Supreme Court of the State of Idaho rendered on the 23rd day of July, 1952 and filed on October 9th, 1952, which State Supreme Court did, by 3-2 decision, reverse the judgment of the Court of original jurisdiction, being the Eighth Judicial District Court of the State of Idaho in and for the

County of Kootenai and held that the provisions of 18-6607 Idaho Code was constitutional against the contention of the appellants that the statute denied the appellants personal liberties as guaranteed by the 14th Amendment to the Constitution of the United States. The petition is made to this Court as the Remittitur of the Supreme Court of Idaho was filed before the petitioners could petition in the State Court.

Opinions Below

The judgment of the Court of original jurisdiction is unreported but a copy thereof is annexed to this petition.

The majority and dissenting opinions of the Supreme Court of the State of Idaho, in the instant case, are reported in 248 Pac. 2nd 218. Another companion case of *State* vs. *Wall*, 248 Pac. 2nd 222, raised the same issues.

The Supreme Court of the State of Idaho disposed of the constitutional questions in this matter upon the authority of a companion case which was submitted to the Supreme Court of the State of Idaho at the same term and is reported as *State* vs. *Evans*, 245 Pac. 2nd 788.

Jurisdiction

Jurisdiction to review this appeal is conferred upon this Court by the provisions of 28 U. S. C. A. 1257 (2).

The judgment of the Supreme Court of the State of Idaho was filed with the remittitur in the office of the Clerk of original jurisdiction on the 9th day of October, 1952 after denying petitioners' application for rehearing.

Summary and Short Statement of Case

Identical informations were filed against the appellants by the Prosecuting Attorney of Kootenai County, State of Idaho on behalf of the State of Idaho, respondent, charging the appellants with violation of the lewd and lascivious statute of the State of Idaho, being 18-6607 Idaho Code.

Demurrers were interposed against the informations challenging the constitutionality of the statute upon which they were informed against upon the grounds that the punishment provided was unconstitutional as a cruel and unusual punishment and upon the further grounds that prosecution under the statute denied the petitioners equal protection under the laws as guaranteed to them by the 14th Amendment to the Constitution of the United States.

On the 3rd day of April, 1951 the Court of original jurisdiction entered a judgment sustaining the demurrers upon the grounds and for the reasons that the statute was unconstitutional in that it did impose cruel and unusual punishment and therefore violated the 14th Amendment to the Constitution of the United States and that the statute further denied the appellants equal protection under the law as guaranteed to them by the 14th Amendment to the Constitution of the United States.

The State of Idaho appealed from this judgment.

By stipulation, the cases were consolidated and submitted to the Supreme Court as companion cases. During the same term the Court also received, for determination, the case of *State* vs. *Evans*, 245 Pac. 2nd 788, wherein identical issues were presented.

The Supreme Court of Idaho, by a 3-2 majority decision, held in the companion case of *State* vs. *Evans*, 245 Pac. 2nd 788, that the statute was constitutional. Upon the authority of the case of *State* vs. *Evans*, 245 Pac. 2nd 788, the constitutional questions, in the instant case, were determined adversely to the contention of these petitioners and the case was reversed.

The lewd and lascivious statute of Idaho provides:

> "Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any

lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life." 18-6607 Idaho Code.

Petitioners have at all times urged that examination of the statute shows that it clearly enunciates that the penalty shall be imprisonment for a term of not more than life, or life imprisonment.

Legislature of the State of Idaho further enacted the Indeterminate Sentencing Act of Idaho, 19-2513 Idaho Code, which was in full force and effect at the time the informations were filed and which provides as follows:

"Indeterminate sentence.—The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall suspend judgment and sentence and parole offenders as provided by Chapter 26 of Title 19, Idaho Code, as amended, or unless it shall impose the death sentence as provided by law, sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence; provided, however, that the enactment of this act shall not affect the indictment, information, prosecution, trial, verdict, judgment, or punishment of any felonies heretofore committed, but all laws now and hitherto in effect relating thereto are continued in full force and effect as to such crimes heretofore committed." 19-2513 Idaho Code.

In dealing with these statutes in light of the contention that the punishment was cruel and unusual, the Supreme Court of Idaho in its opinion stated as follows:

> "With considerable justification it is urged that conduct of a comparatively innocent nature, such as "necking" or "petting", where a child under sixteen is involved, may, in the eyes of some enforcement officers, constitute a violation of this statute. Be that as it may, it is obvious that the acts of a more or less trivial nature are within its broad terms. *Life imprisonment for such offenses would be cruel and unusual punishment.* Even our rape statute does not require such punishment.
>
> We are, therefore, faced with the alternative of declaring the act unconstitutional or so construing it as to comport with that instrument. It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction.
>
> To construe sec. 18-6607 as requiring or permitting the district judge in imposing sentence to fix the maximum, and that it may be less than life, is a reasonable construction. The presumption is that the legislature intended to act within the limits of the constitution. Therefore, in order to give effect to the act we hold that it is to be construed as permitting the district judge to fix a maximum imprisonment at less than life."

Questions

1. Was the action of the Supreme Court of Idaho, in this case, judicial or legislative?

2. If the Supreme Court of Idaho, in its opinion, acted in a legislative capacity, does that action deprive petitioners of due process of law under the 14th Amendment?

3. Does the due process of law clause, of the 14th Amendment, protect state citizens against the destruction of the

doctrine of separation of powers by the respective branches of state government?

4. Have petitioners had equal protection of the law when the Supreme Court of Idaho in this case functioned as a legislative body and not a judicial body?

Argument

The Supreme Court of the State of Idaho, by its opinion, has conceded that life imprisonment, under the statute, would be unconstitutional as a cruel and unusual punishment. To avoid that result it is the contention of these petitioners that the Supreme Court of the State of Idaho, as evidenced by the opinion, did not act as a Court but legislated new law in the State of Idaho.

> "Nor shall any state deprive any person of life, liberty or property without due process of law." 14th Amendment to the Constitution of the United States.
>
> "But it must be observed that the prohibition of the amendment referred to all the instrumentalities of the state, to its legislature, executive and judicial authorities, and, therefore whoever, by virtue of public position, under a State government, deprives another of any right protected by that amendment against the deprivation of the state 'violates this constitutional inhibition and as he acts in the name of the state and is clothed with state power, his act is that of the state'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and the state has clothed one of the agents with power to annul or evade it." *Chicago B. & Q. Railroad Company* v. *Chicago* 166 U. S. 226

Due process of law in its very meaning, assures all persons that the legislative, judicial and executive branches of government will act within their own province and jurisdiction. The doctrine of separation of powers in government

is as much a guaranteed right to individuals as is freedom of worship, speech, and assemblage.

Under its province no state governor could conduct a trial, find guilt and pass judgment. We here contend likewise that no Court, under the due process clause, can enact new legislation during hearing or review to achieve a result. In other words the Supreme Court of Idaho has, by this opinion, not acted as a Court but has acted as a legislative body and has amended the law of the legislature to avoid the unconstitutionalities and then has gone further and repealed the Indeterminate Sentencing Act of the State of Idaho to strengthen that result insofar as applicable to lewd and lascivious conduct.

We are not unmindful of that rule of law which this Court has long adhered in refusing to reconstrue statutes which have been construed by the highest Court of the State.

Had there been statutory construction in this case there would not be this petition for appeal.

> "Of course it is not open to us to revise the construction placed upon the statute by the State Court but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve." *Southwestern T & T Company* v. *Danaher* 238 U. S. 482.

The petitioners further contend and do urge in this matter that they have been denied equal protection of the law when the Supreme Court of the State of Idaho quit functioning as a Court and functioned as a legislature to obtain this result. In other words they were not granted Court hearing but were subjected to legislative fiat in judicial disguise which in and of itself is foreign to equal protection of law in this nation.

We believe that the appeal presents questions of substance as to error by the Supreme Court of the State of Idaho in its interpretation of its authority and as to the question as of the constitutionality of the lewd and lascivious statute of Idaho, 18-6607 Idaho Code, in the light of the Indeterminate Sentencing Act of Idaho, 19-2513 Idaho Code, and urge that the questions herein presented are of great importance.

Respectfully submitted,

ATTORNEYS FOR APPELLANTS
EDW. S. FRANKLIN,
Residence and P. O. Address:
Seattle, Washington;

WM. S. HAWKINS,
Residence and P. O. Address:
Coeur d'Alene, Idaho;

E. L. MILLER,
Residence and P. O. Address:
Coeur d'Alene, Idaho.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 7778-7780

STATE OF IDAHO, *Plaintiff-Appellant,*

v.

JAMES PETTY, *Defendant-Respondent;*

STATE OF IDAHO, *Plaintiff-Appellant,*

v.

TOM E. DEANE, *Defendant-Respondent.*

Coeur d'Alene, May Term, 1952. Filed July 23, 1952, Clay Koelsch, Clerk.

Appeals from the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai. Honorable O. C. Wilson, District Judge.

To information charging lewd and lascivious conduct, the court below sustained demurrers and dismissed the actions. *Reversed.*

Robert E. Smylie, Attorney General; Wm. H. Bakes, Assistant Attorney General, Boise; and Wm. D. McFarland, Prosecuting Attorney, Coeur d'Alene, for appellant.

Wm. S. Hawkins, Coeur d'Alene, for respondents.

Davison & Davison and R. H. Copple, Boise, Amici Curiae.

TAYLOR, J.

Pursuant to stipulation these cases involving identical issues were consolidated on appeal.

The defendants, respondents here, were separately charged by information with the crime of lewd and lascivi-

ous acts under the provisions of § 18-6607 I. C. The acts charged in each case are alleged to have been committed with and upon the body and person of a female child under the age of sixteen years. Demurrers to the information were filed raising the same issues in both cases. The demurrers were sustained by the trial court on the ground that the above statute is unconstitutional. As to constitutionality, the act is attacked here on the same grounds urged in the case of *State* v. *Evans*, —— Idaho ——, filed June 16, 1952. The decision in that case disposes of all issues in these cases except that raised by subparagraph (a) of the demurrers, which urges that more than one offense is charged. In *State* v. *Evans*, supra, the lewd and lascivious acts were alleged to have been committed against the person of a female child under the age of sixteen, but no intent to rape was there alleged. Each of the informations now before us sets forth certain lewd and lascivious acts with a female child under sixteen years of age, alleges that such acts were committed "with the intent of arousing, appealing to, and gratifying the lust and passion and sexual desires of said defendant and of said minor" and continues "with the intent and purpose of having sexual intercourse with the said" minor child. Thus these informations charge the specific intent required by § 18-6607 I. C., and the specific intent required as an element of assault with intent to rape. § § 18-901 I. C., 18-907 I. C., and 18-6101 I. C. The other elements of both crimes being sufficiently alleged, the informations charge both lewd and lascivious conduct and assault with intent to commit rape.

In *State* v. *Evans*, supra, we held that the charge of lewd and lascivious conduct did not necessarily include assault with intent to rape. That is, a person might commit lewd and lascivious acts upon and with the body of a female child under sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, without the intent to have sexual intercourse. But the reverse is not true, because any acts leading to rape or assault with intent to rape, would be lewd and lascivious and would evince the intent described in § 18-6607, I. C. "* * * where an offense cannot be com-

mitted without necessarily committing another offense, the latter is a necessarily included offense." *People* v. *Greer* (Cal.) 184 P. 2d 512 at 516. *People* v. *Chapman* (D.C.A. Cal.) 185 P. 2d 424.

The statutory rule against charging more than one offense (RR 19-1413 and 19-1703 I. C.) does not apply to included offenses. *State* v. *Garney*, 45 Idaho 768, 265 P. 668; *State* v. *Alvord*, 47 Idaho 162, 272 P. 1010; *State* v. *Smailes*, 51 Idaho 321, 5 P. 2d 540; *State* v. *Hix*, 58 Idaho 730, 78 P. 2d 1003; *State* v. *Garde*, 69 Idaho 209, 205, P. 2d 504. Where the state elects to charge and prosecute on an included offense rather than on the completed or higher offense the information is not subject to challenge for duplicity even though it may appear therefrom that the completed or higher offense had been committed. *State* v. *Wall*, —— Idaho ——, filed July 23, 1952. The matter of determining which of two or more applicable criminal statutes will be invoked is for the State to decide. It is not a matter of concern to the accused so long as his constitutional and statutory rights are not violated. *State* v. *Gutke*, 25 Idaho 737, 139 P. 346. In the case of included offenses he is protected against double jeopardy since a conviction or acquittal of one is a conviction or acquittal of the other. §§ 19-107, R 19-1717, R 19-1719, 18-301 I. C.; *State* v. *Gutke*, supra, *State* v. *Randolph*, 61 Idaho 456, 102 P. 2d 913; *People* v. *Greer* (Cal.) 184 P. 2d 512.

It is a right of the accused to be informed of the exact charge against him. He is entitled to know for what specific offense he is to be tried. Art. 1, § 13, Idaho Constitution; RR 19-1409, 19-1411, 19-1418 and 19-1514 I. C. Here it is apparent from the complaints filed with the magistrate, and the informations, that the state seeks to invoke § 18-6607 I. C. and to prosecute the defendants for lewd and lascivious conduct. And this is the particular offense specifically named in the orders of the committing magistrate. The allegation in the informations of an intent to have sexual intercourse is, therefore, surplusage, subject to be striken on motion of the defendants. In any event, to be treated as such.

The demurrers should have been overruled.
Judgments reversed.
GIVENS, *C. J.*, and PORTER, *J.*, concur.

KEETON, *J.*, dissenting:

Following a commitment by the probate judge of Kootenai County, Idaho, the prosecuting attorney filed an information against the respondent, in part as follows:

> "That the said James Petty is hereby accused by Wm. D. McFarland, Prosecuting Attorney of Kootenai County, State of Idaho by this information with the crime of COMMITTING LEWD AND LASCIVIOUS ACTS UPON THE BODY OF A MINOR COMMITTED AS FOLLOWS, to-wit: * * * the said defendant James Petty did then and there feloniously, maliciously, wilfully, and lewdly commit lewd and lascivious acts upon, and with the body of * * *, a female minor, under the age of 16 years, to-wit: 15 years of age, and not the wife of said defendant, as follows: * * *"

Following this the prosecutor detailed various acts of an indecent nature alleged to have been committed by the respondent for the purpose of arousing, appealing to, and gratifying the lust and passion and sexual desires of said respondent and of said minor child, "with the intent and purpose of having sexual intercourse with the said * * *."

The respondent was arraigned, and by proper motion asked to be informed just what crime was alleged to have been committed.

The prosecutor elected to proceed and prosecute the respondent "for lewd and lascivious acts upon the body of a minor, as defined by Sec. 18-6607 Idaho Code". Thereupon, the respondent presented a demurrer to the information on various grounds, among which are the following: first, that more than one offense is charged in the information; 2nd, that Sec. 18-6607 I. C. is unconstitutional for numerous reasons alleged; further that the said Sec. 18-6607 I. C. is uncertain, vague and unintelligible, as it is impossible to determine from the section just what acts are made criminal.

The respondent contended that the section was in violation of the 14th amendment to the Constitution of the United States which provides "no state shall make or enforce any law which shall * * * nor deny to any person within its jurisdiction the equal protection of the laws", and further contended that it was in violation of Sec. 6, Art. 1, of the Constitution which, among other things provides: " * * * Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted."

The district judge sustained the demurrer on all the grounds alleged and dismissed the proceedings. The State appealed.

I discussed briefly the constitutionality of the statute in question in a dissenting opinion in the case of State v. Evans, Case No. 7849, filed June 16, 1952, —— Ida. ——, —— Pac. (2d) ——. I will not repeat here what I there said, as the dissenting opinion is applicable to the matter now being considered as well as to the case of State v. Evans. The statute, Sec. 18-6607 I.C., in my opinion, is clearly unconstitutional.

In this case, as in the case of State v. Evans, the attorney general argued that the provision of the law challenged here was inconsistent with other defined sex offenses and that the same were therefore necessarily impliedly repealed, so far as covered by the statute under discussion; and further contended that if such inconsistent statutes and penalities, particularly those that provided a lesser penalty for their violation were not impliedly repealed, then, of course, the statute was unconstitutional as not affording equal protection of the law to all persons.

The holding of the majority opinion " * * * any acts leading to rape or assault with intent to rape, would be lewd and lascivious and would evince the intent described in Sec. 18-6607 I.C. (lewd and lascivious statute), and "The statutory rule against charging more than one offense * * * does not apply to included offenses. * * * Where the state elects to charge and prosecute on an included offense rather than on the completed or higher offense the information is not subject to challenge for duplicity even though it may appear therefrom that the completed or higher offense had been committed."

If I correctly interpret this holding, one could be charged with rape under circumstances defined by the statute under consideration, Sec. 18-6607 I.C., and convicted of a violation of the lewd and lascivious statute as an included offense.

In other words, a violation of the lewd and lascivious statute, Sec. 18-6607 I.C., is a lesser offense than rape, Sec. 18-6101 I.C., or assault with intent to commit rape, Sec. 18-907 I.C. Thus a person could be put on trial for rape in violation of Sec. 18-6101 I.C., with a minimum sentence provided in Sec. 18-6104 I.C. of one year imprisonment, and on conviction of the asserted lesser offense, a violation of the lewd and lascivious statute, be sentenced to the penitentiary for life.

This case was not argued to this Court on any such grounds. The attorney general and the attorneys representing the respondent made no argument, nor did they or either file any briefs on the points supposed to be decided. On the points decided the respondent has never been heard. A lesser offense is necessarily one in which the punishment to be imposed is less than the punishment that could be imposed were the person convicted of the higher offense. An included offense is necessarily a lesser and not a greater offense.

The term "lesser offense" in statute prohibiting sentence or finding of guilt for lesser offense than offense charged means offense necessarily included in offense defined in particular section of act. Ramsey v. State, 183 N.E. 648, 204 Ind. 212.

A proper distinction between "included and non-included offenses" in a criminal statute is whether they involve essentially same or different elements of conduct, and if both offenses have a common basis, the greater offense is usually deemed to include the lesser. People v. Gossman, 212 Pac. (2d) 585, 95 Cal. App. (2d) 293. See also People v. Chapman, 185 Pac. (2d) 424, 81 Cal. App. 857, and People v. Greer (Cal.) 184 Pac. (2d) 512.

The rule is stated in 42 C.J.S. 1294, Sec. 271, in substance as follows: Where an indictment charges an offense which includes within it another *lesser* offense, or one of a

lower degree, accused although acquitted of the higher offense, may be convicted of the lesser; and at page 1297, Sec. 275, the author states:

> "To warrant conviction of a lesser offense on an indictment or information charging a greater offense, it is essential that the allegations describing the greater offense contain all the essential averments relating to the lesser offense or that the greater offense necessarily include all the essential ingredients of the lesser."

It is further a statutory rule that an indictment can only charge one offense. Sec. 19-1413 I.C.

A similar criminal act or transaction cannot be split into two or more separate offenses. The same act or transaction cannot constitute two or more crimes, the essential elements of which are mutually exclusive. If the essential elements of two crimes are distinct and different and the one crime cannot be included in the other, a person cannot be guilty of both crimes under the same set of facts.

> "Where certain elements of crime charged may be taken away leaving necessary elements for another complete crime, latter is termed 'included offense' ". State v. Marshall, 220 N.W. 106, 206 Iowa 373.

It seems to me the holding in the majority opinion goes so far afield from well known, established, fundamental, axiomatic propositions of law and procedure, that no extensive discussion should be required to lead one to the conclusion that lewd and lascivious conduct is not and cannot be included as a lesser offense in a charge of assault with intent to commit rape, or rape. The two crimes are distinct and altogether different offenses. A violation of one section does not violate the other.

What has been said in the case of State v. Petty applies equally to the case of State v. Deane. The facts are similar and hence will not be separately commented on.

For the above and other reasons, the ruling of the trial court was correct and should be affirmed.

THOMAS, *J.*, dissenting:

I adhere to the views expressed in the dissent of Justice Keeton and the dissent of the writer in the case of State v. Evans, No. 7849, filed June 16, 1952, — Idaho —, — P. 2d —. For the reasons set forth in such dissenting opinion, the judgment of the lower court sustaining the demurrer to the indictment on the ground that Section 18-6607, Idaho Code, is unconstitutional, should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE,
Appellants,

vs.

STATE OF IDAHO

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

ROBERT E. SMYLIE,
Attorney General of Idaho;

WILLIAM H. BAKES,
Assistant Attorney General of Idaho, Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 675

JAMES PETTY AND TOM E. DEANE,

Appellants,

vs.

STATE OF IDAHO

Appellee

STATEMENT OF APPELLEE IN OPPOSITION TO APPELLANTS' PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes Now the Attorney General of the State of Idaho on behalf of the State of Idaho, appellee in the above entitled matter, pursuant to Rule 12 (3), Supreme Court Rules and discloses the following as ground making against the jurisdiction of this Honorable Court in the said matter.

Summary of Action

On the 8th day of December, 1950, criminal complaints were filed in the Probate Court of Kootenai County, Idaho, charging appellants in this action with violation of Section 18-6607, Idaho Code, the so-called Lewd and Lascivious Statute. They were bound over for trial and on the 19th

day of March, 1951, Informations were filed against appellants herein in the District Court charging violation of Section 18-6607, Idaho Code. Demurrers were filed to the Informations in both cases, which, except for the names were identical. The demurrers raised the question of unconstitutionality of the statute under which the appellants were charged. Appellants urged that the statute conflicted with the Constitution of Idaho in the following particulars:

> "Comes now James Petty (Tom Deane), the above named defendant, by and through his attorney of record, and demurs to the information filed against said defendant in the above entitled Court on March 19, 1951, upon the following grounds:
>
> * * * *
>
> "(g) The facts stated purporting to charge the defendant with lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that the same is unconstitutional for the reason that it is in violation of Section 6, Article 1 of the Constitution of the State of Idaho which provides that 'no excessive fines be imposed or cruel or unusual punishment be inflicted; for the reason that said Section 18-6607 Idaho Code provides a mandatory sentence of life imprisonment, which sentence is unusual in that the acts set forth in the information alleged to be the manner and means and which constituted the lewd and lascivious acts complained of also charge and constitute the crime of assault with intent to commit statutory rape, the penalty for which is only 14 years imprisonment."

On April 3, 1951, the District Court sustained the demurrers to the informations on the ground that the statute under which they were charged was void as being in violation of the Constitution of the State of Idaho and the Constitution of the United States. On April 17, 1951, the cases were appealed to the Supreme Court of Idaho by the State.

The cases of *State* v. *Petty* and *State* v. *Deane* were consolidated for hearing and disposition.

At approximately the same time the above cases arose, another case in the Sixth Judicial District for Bingham County arose on a similar state of facts charging one J. C. Evans with a violation of the identical statute here involved. A general demurrer was likewise interposed in the *Evans* case and the District Court sustained the demurrer on the same grounds and for the same reasons as the Court had in the *Petty* and *Deane* cases. The *Evans* case was also appealed by the State to the Supreme Court and all three cases were pending at the same time.

The *Evans* case was presented to the Supreme Court of Idaho at the Pocatello term, a few weeks prior to the time the *Petty* and *Deane* cases were presented to the Supreme Court sitting at Coeur d'Alene. It is the *Evans* case which the Court referred to in its opinion. *State* v. *Evans*, 245 P. 2d 788.

The Statute involved in Section 18-6607, Idaho Code, which provides:

> "18-6607. Lewd Conduct with Minor or Child under Sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."

On July 23, 1952, the Supreme Court of Idaho following the rule announced in the *Evans* case reversed the District Court in the cases of *State* v. *Petty* and *State* v. *Deane* and held that Section 18-6607, Idaho Code, was constitutional against the contentions advanced that it was un-

constitutional. Motion for rehearing was made by appellants Petty and Deane and was duly denied by the Court.

Section 19-2513, Idaho Code, the so-called Indeterminate Sentencing Act was enacted by the Idaho Legislature in 1947 and was in force at all times herein mentioned. That Act provides:

> "19-2513. INDETERMINATE SENTENCE.—The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall suspend judgment and sentence and parole offenders as provided by Chapter 26 of Title 19, Idaho Code, as amended, or unless it shall impose the death sentence as provided by law, sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence the maximum term of imprisonment provided by law therefor, and judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence; provided, however, that the enactment of this act shall not affect the indictment, information, prosecution, trial, verdict, judgment, or punishment of any felonies heretofore committed, but all laws now and hitherto in effect relating thereto are continued in full force and effect as to such crimes heretofore committed."

Counsel for Petty and Deane urged the Court that this statute made mandatory a sentence of life for a violation of the Lewd and Lascivious Statute and that that amounted to a cruel and unusual punishment and was in conflict with Section 6, Article 1 of the Constitution of the State of Idaho. The Court in the *Evans* case, cited by the Court in *State* v. *Petty* and *State* v. *Deane*, held:

> "With considerable justification it is urged that conduct of a comparatively innocent nature, such as 'neck-

ing' or 'petting', where a child under 16 is involved, may, in the eyes of some enforcement officers, constitute a violation of this statute. Be that as it may, it is obvious that acts of a more or less trivial nature are within its broad terms. Life imprisonment for such offenses would be cruel and unusual punishment. Even our rape statute does not require such punishment. Storseth v. State, Idaho, 236 P. 2d 1004.

"(10) We are, therefore, faced with the alternative of declaring the act unconstitutional or so construing it as to comport with that instrument. It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction. Scandrett v. Shoshone County, 63 Idaho 46, 116 P. 2d 225; State ex rel. Wright v. Headrick, 65 Idaho 148, 139 P. 2d 761.

"(11) To construe § 18-6607 as requiring or permitting the district judge in imposing sentence to fix the maximum, and that it may be less than life, is a reasonable construction. The presumption is that the legislature intended to act within the limits of the constitution. . . ."

Argument

Counsel for appellants Petty and Deane propound the following questions:

"1. Was the action of the Supreme Court of Idaho, in this case, judicial or legislative?

"2. If the Supreme Court of Idaho, in its opinion, acted in a legislative capacity, does that action deprive petitioners of due process of law under the 14th Amendment?

"3. Does the due process of law clause, of the 14th Amendment, protect state citizens against the destruction of the doctrine of separation of powers by the respective branches of state government?

"4. Have petitioners had equal protection of the law when the Supreme Court of Idaho in this case functioned as a legislative body and not a judicial body?"

We think that no substantial federal question is framed by the issues of the case or by the questions above propounded. The demurrers raised the question of unconstitutionality of the Lewd and Lascivious Statute because the punishment provided was cruel and unusual. The statute was alleged to be contrary to Article 1, Section 6, Constitution of Idaho.

The Supreme Court has construed the statute in such a manner that the objection that the statute carries a cruel and unusual punishment is removed. *Alabama State Fed. of Labor* v. *McAdory*, 65 Sup. Ct. 1384, 325 U. S. 450, 470, 89 L. ed. 1725. The essence of appellants' argument is that the Supreme Court of Idaho is wrong, it has misconstrued the Constitution of Idaho, that it should have declared the Lewd and Lascivious Statute, Section 18-6607, Idaho Code, unconstitutional, that the failure to do so amounts to judicial legislation.

"The judicial power of the State of Idaho is vested in a court for the trial of impeachments, a Supreme Court, district courts, probate courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established. . . ."

Article 5, Section 2, *Constitution of Idaho.*
State ex rel. McKelvey v. *Barnes*, 55 Idaho 578, 45 P. 2d 293.

"The court does not exercise legislative functions in interpreting, construing or giving meaning to a legislative act."

Mountain View Rural Tel. Co. v. *Interstate Tel. Co.*, 55 Idaho 514, 76 P. 2d. 723.
State v. *Clausen*, 146 Wash. 588, 264 Pac. 403.
People v. *Bruner*, 343 Ill. 146, 175 N. E. 400.

The Supreme Court of the United States derives its authority to review final judgments of the highest court of a

state from Title 28, Section 1257, U. S. C. A., which provides as follows:

> "§ 1257. STATE COURTS; APPEAL; CERTIORARI. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

This Court has repeatedly held that it will not review a decision of a State Supreme Court not involving a federal question.

"A decision of a state court construing the statutes of the state is not subject to review by the United States Supreme Court."

36 C. J. S. 167, *Federal Courts*, Section 264.

In the case of *Schuylkill Trust Co.* v. *Pennsylvania*, 58 Sup. Ct. 295, 302 U. S. 506, 82 L. ed. 392, this Court said:

> "First. When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not incon-

sistent with our opinion. It is clear that the State courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax.

"Second. The contention that the State courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act."

Appellants' argument appears to be that the Supreme Court of Idaho should have declared the Lewd and Lascivious Law unconstitutional, because the penalty provided was a cruel and unusual punishment contrary to the Idaho Constitution, that in fact the Supreme Court construed it so that the penalty is not cruel and unusual but that this construction was beyond the power of the Supreme Court and involved a legislative function, and that the usurpation of legislative power by the Supreme Court of Idaho contravenes the 14th Amendment of the Constitution of the United States. The *Schuylkill* case seems to answer that contention.

In the case of *Quong Ham Wah Co.* v. *Industrial Accident Commission of California*, 41 Sup. Ct. 373, 255 U. S. 445, 65 L. ed. 723, this Court said:

"But it is elementary that this court is without authority to review and revise the construction affixed to

a state statute as to a state matter by the court of last resort of the state. (Citing cases.)

* * * * * * *

"True, it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it, and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon.

"Dismissed for lack of jurisdiction."

Under the decision of the Supreme Court of Idaho in the cases of *State* v. *Evans*, *State* v. *Petty* and *State* v. *Deane*, it is possible that a sentence which might be assessed could be cruel and unusual if it were patently excessive. At this stage of the proceeding, however, these appellants cannot be heard to complain since they have never been tried. This Court will not, and the Idaho courts will not, presume them guilty at this time. They are entitled to a trial by jury and appeal to the Supreme Court of Idaho, if their rights should be jeopardized. If the Idaho courts should find these appellants guilty and assess an excessive penalty, at that point this Court may on petition interfere.

This Court should not at this time accept jurisdiction of

this case, because there is no federal question which will justify the exercise of jurisdiction.

Respectfully submitted,

ROBERT E. SMYLIE,
Attorney General,
State of Idaho.

WILLIAM H. BAKES,
Assistant Attorney General
Address: Statehouse, Boise, Idaho,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE, *Appellants,*

vs.

STATE OF IDAHO, *Appellee*

MOTION TO DISMISS

Comes now Robert E. Smylie, Attorney General of the State of Idaho, for and on behalf of the State of Idaho, Appellee in the above entitled case, and moves this Honorable Court for its Order dismissing the above entitled appeal from the Supreme Court of the State of Idaho, for the reason that this Honorable Court has no jurisdiction of the subject matter of the case for the reason that there is no sufficient federal question for this Court to take jurisdiction.

Dated this 24th day of January, 1953.

ROBERT E. SMYLIE,
Attorney General,
State of Idaho,

WILLIAM H. BAKES
Assistant Attorney General
Address: Statehouse, Boise, Idaho,
Attorneys for Appellee.

Office - Supreme Court, U. S.
FILED
MAR 25 1953
HAROLD B. WILLEY, Clerk

No. 675

In the

Supreme Court

of the

United States

TOM E. DEANE
JAMES PETTY,
Appellants

vs.

STATE OF IDAHO
Appellee

Brief of Appellants

Opposing Motion to Dismiss Appeal from the Supreme Court of the State of Idaho

---

WM. S. HAWKINS
E. L. MILLER
EDWARD S. FRANKLIN
Attorneys for Appellants

In the

Supreme Court

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WM. S. HAWKINS
E. L. MILLER
EDWARD S. FRANKLIN
Attorneys for Appellants

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In the

Supreme Court

of the

United States

TOM E. DEANE
JAMES PETTY,
Appellants

vs.

STATE OF IDAHO
Appellee

Brief of Appellants

Opposing Motion to Dismiss
Appeal from the Supreme Court of the
State of Idaho

Comes now the appellants pursuant to Rule 7 (3), Rules of the Supreme Court of United States, in reply to appellees Motion of Dismissal.

I.

This appeal presents for determination only questions of law.

The appellants were informed against by the Prosecuting Attorney of Kootenai County, State of Idaho, under the following statute:

> "Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."
>
> 18-6607 Idaho Code

II.

In response to the information the appellants, in the court of original jurisdiction, caused to be filed the following demurrer:

"IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

STATE OF IDAHO, *Plaintiff,*

vs.

TOM DEANE, *Defendant.*

DEMURRER TO INFORMATION

Comes now Tom Deane the above named defendant, by and through his attorney of record, and demurs to the information filed against said defendant in the above entitled court on March 19, 1951, upon the following grounds:

It appears that

(a) More than one offense is charged in the information in that said information charges the crime of committing lewd and lascivious acts upon the body of a minor, and also charges the crime of assault with intent to commit rape upon said minor;

(b) The facts stated purporting to charge the defendant with committing lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that Section 18-6607 Idaho Code, the statute which defines said crime and creates a statutory offense, does not define the acts necessary to constitute such an offense with such certainty that a person may determine whether or not he has violated the law at the time he does the act which is charged to be a violation thereof; that innocent acts not otherwise prohibited by law could under the terms of said act be construed to be criminal and violative of said act; that by reason thereof the same is unconstitutional and void.

(c) Said Section 18-6607 Idaho Code is uncertain, vague and unintelligible in that it cannot be ascertained what lewd and lascivious acts are prohibited, in that it leaves to the jury to determine what acts may or may not be lewd or lascivious, and the same are not properly defined by the Act.

(d) The facts stated in said information charging the defendant with committing lewd and lascivious acts upon the body of a minor under the age of 16 years do not constitute and state a public offense in that the act is in violation and contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it violates

> 'no state shall make or enforce any law which shall . . . . deny to any person within its jurisdiction the equal protection of the laws'

upon the grounds and for the reason that the punishment prescribed by Section 18-6607 makes life imprisonment upon conviction mandatory and a person charged in the same language and with the same acts as set forth in the information herein, but wherein the Prosecuting Attorney elects to charge the defendant with assault with intent to commit rape subject such person to the penalty of only fourteen (14) years in the State Penitentiary. By reason thereof the said statute denies this defendant the equal protection of the laws of the State of Idaho.

(e) Said act is further in violation of Section 13, Article 1 of the Idaho Constitution for the reasons set forth in the preceding paragraph (d), and it attempts to deprive the defendant of his liberty without due process of law and is in derogation of Section 1 of the Fourteenth Amendment; that it leaves to the arbitrary decision of a prosecuting attorney whether the acts complained of should be prosecuted under the lewd and lascivious act which has a mandatory

penalty of life imprisonment, or under the assault with intent to commit rape act which has a mandatory penalty of 14 years imprisonment, and by reason thereof the said act is discriminatory.

(f) Said Section 18-6607 operates to deprive the defendant of his liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution for the reasons hereinbefore related.

(g) The facts stated purporting to charge the defendant with lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that the same is unconstitutional for the reason that it is in violation of Section 6, Article 1 of the Constitution of the State of Idaho which provides that 'no excessive fines be imposed or cruel or unusual punishment be inflicted' for the reason that said Section 18-6607 Idaho Code provides a mandatory sentence of life imprisonment, which sentence is unusual in that the acts set forth in the information alleged to be the manner and means and which constituted the lewd and lascivious acts complained of also charge and constitute the crime of assault with intent to commit statutory rape, the penalty for which is only 14 years imprisonment.

WHEREFORE, defendant prays that the information be dismissed with prejudice.

DATED, this 23rd day of March, 1951.

/s/ RAY DURHAM
Attorney for Defendant"

In Idaho a demurrer is a proper pleading to raise questions of law relative to the information.

"The defendant may demur to the indictment (herein information) when it appears upon the face thereof, either:

> 5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution."
>
> 19-1703 Idaho Code
> (para. ours)

The demurrer of the appellants challenged the legality of the statute, 18-6607 Idaho Code, upon the grounds that it violated appellants rights under the Constitution of the State of Idaho and those rights guaranteed the appellants under the Fourteenth Amendment of the Federal Constitution.

III.

It is urged by the Attorney General in his statement that the appellants have raised issues involving the State Constitution and are therefore precluded from a review in this Court of their Federal rights.

The appellants are citizens of the United States of America. They are also citizens of the State of Idaho. As citizens of Idaho, the State Constitution affords them certain rights. As citizens of these United States the Federal Constitution, under the Fourteenth Amendment, guarantees them additional rights.

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."
>
> Fourteenth Amendment to the Constitution of the United States

> "Thus the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides.

> And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

COLGATE *vs.* HARVEY
296 U. S. 404
80 L. Ed 290
56 S. Ct. 252

The appellants are entitled, by virtue of that dual citizenship to claim and assert under both constitutions those guarantees. To accede to the inference of the appellees that because the appellants raised for determination issues arising under the constitution of the State of Idaho that they must forego their privileges and immunities under the Fourteenth Amendment of the Federal Constitution is destructive of Federal citizenship. It would, in and of itself, render the Fourteenth Amendment subservient to state action rather than being a prohibition against State action.

IV.

Upon hearing the demurrer of the appellants in the court of original jurisdiction the following judgment and order was rendered.

"IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*
vs.
TOM DEANE, *Defendant.*

ORDER

The defendant, Tom Deane, having been arraigned in Open Court upon the information

charging said defendant with the crime of committing lewd and lascivious acts upon the body of a minor, and the said defendant having filed a demurrer to said information asserting that more than one offense was charged in the information and, second, that Section 18-6607 Idaho Code is void as being in violation of the Constitution of the State of Idaho and the Constitution of the United States, and thereafter, upon motion of the defendant, the state having elected to prosecute the defendant for lewd and lascivious acts upon the body of a minor, as defined by Section 18-6607 Idaho Code, and the demurrer having been orally argued by counsel for the state and the defendant, and counsel having submitted written briefs to the court and the court having taken the same under advisement,

NOW THEREFORE, the demurrer of the defendant, Tom Deane, is hereby sustained upon the grounds that said Section 18-6607 Idaho Code is void as being unconstitutional for all of the reasons set forth in said demurrer, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said information be and the same is hereby dismissed.

DATED this 3rd day of April, 1951.

/s/ O. C WILSON,
District Judge"

This order, the foundation of the appeal to the State Supreme Court, recognized that the statute, 18-6607 Idaho Code, was violative of the appellants rights under the Constitution of the State of Idaho and also under the Federal Constitution. Inasmuch as the appeal to the State Supreme Court was taken from this order, there was presented to the State Supreme Court, for determination, appellants rights under the Fourteenth Amend-

ment to the Constitution of the United States.

The Supreme Court of the State of Idaho, by a 3-2 decision, reversed this order of the lower court by reference to an opinion rendered by the same court in the case of State v. Evans, ---------- Idaho ----------, 245 Pac. 2d 788, a companion case. To reverse this order wherein the appellants rights under the Fourteenth Amendment had been recognized as in issue, the Supreme Court of the State of Idaho necessarily had to determine appellants rights under the Federal Constitution. It could not have reversed the lower court's order or judgment without such a determination It is not essential that the State Court, by express wording in their opinion, dispose or treat a right under the Federal Constitution before the Supreme Court of the United States has jurisdiction. If it is clear, as in this case, that the State Court could not have arrived at a decision or determination without having first considered and decided Federal questions presented, then an appeal will lie to the Supreme Court of the United States under the provisions of 28 U.S.C.A., 1257, Sub Section 2.

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."
>
> 28 U.S.C.A., 1257
> Sub Section 2
> (See also Anno 84,
> L. Ed. 925)
>
> " 'If it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the Constitution of the United States was

drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question.' "

McCullough v. Virginia
172 U.S. 102, 43 L. Ed.
382, 19 S. Ct. 134

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under 237 of the Judicial Code."

Fiske v. Kansas
274 U.S. 380, 71
L. Ed. 1108, 47
S. Ct. 655

"We granted certiorari in this case 'because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution.' 342 U.S. 33, 96 L. Ed. 46, 72 S. Ct. 10. This Court, alone, is the final arbiter of such a claim, and our grant of certiorari should entitle petitioner to the chance to have the matter resolved by this Court—provided that the state judgment was not based on an adequate state ground."

Dixon v. Duffy
—— U. S. ——
97 L. Ed. (Advance
p. 137)

V.

The appellants further urge that the action taken by the Supreme Court of the State of Idaho was also a deprivation of their rights under the due process laws as guaranteed unto them by the Fourteenth Amendment and, therefore, reviewable herein under the following propositions.

The State of Idaho provides for appellate review by the Supreme Court of the State of Idaho.

Due process of law therefore, under the jurisprudence of the American states would provide that such an appeal would involve judicial action and judicial determination.

> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create that cause."
>
> Marbury v. Madison
> 1 Cranch 138
> 2 L. Ed. 60

The Constitution of Idaho contains the following:

> "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."
>
> Constitution of the
> State of Idaho
> Art. 1, Sec. 3

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly

belonging to either of the others, except as in this constitution expressly directed or permitted."

Constitution of the
State of Idaho
Art. 2, Sec. 1

The question that was presented to the Supreme Court of the State of Idaho for determination was whether or not the following legislation under which the appellants were informed was constitutional.

"Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."

18-6607 Idaho Code

In connection with this statute the Indeterminate Sentencing Act of Idaho which was at that time in full force and effect, provided:

"The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed felony, the court shall sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence the maximum term of imprisonment provided by law therefor, and judgment

and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence;"

19-2513 Idaho Code

Under the constitutional provisions of the State of Idaho and under the due process clause as guaranteed by the Fourteenth Amendment to the Constitution of the United States, these appellants were entitled to receive judicial action by the Supreme Court of the State of Idaho.

As will be noted from their opinion, the Supreme Court of the State of Idaho did not act as a court but acted as a legislative body, amending the statutes before them to obtain a result, all under the guise of judicial determination. The appellants would have undoubtedly received a better judicial determination before the very legislature that enacted these statutes than they received at the hands of the Supreme Court of the State of Idaho. The plain language of these statutes clearly and explicitly states legislative intent, and that legislation is remote from the result obtained by the Supreme Court of the State of Idaho.

The doctrine of separation of powers is an inherent right guaranteed to state citizens by the Fourteenth Amendment as are the other constitutional guarantees made to them by this provision.

If a state body or a state court, which is the only forum in which a right can be enforced, itself transgresses and destroys the constitutional concept of government, then the only redress for such wrong is by appeal to the

United States Supreme Court as the Supreme Court of the land for the protection of these individuals rights. It is the position of the appellants that the legislation under which they were charged is obviously a deprivation of their constitutional guarantees under the Fourteenth Amendment, and was equally so under the constitution of the State of Idaho.

A succinct, and accurate definition of judicial province in interpretation of statutes is set forth in the case of State v. Patriarca, (R.I.) 43 A. 2d. 254, 160 A.L.R. 387. The Court said:

> "Let us say here at the outset that our duty in the premises is solely to construe that statute befor us and not to amend it so that it may promote what we might consider a sounder public policy in the prosecution of crime. What is or shall be, within constitutional limits, the policy of the state in the enforcement of its criminal laws is not in our keeping. The constitution vests such power in the legislature. That department declares the policy of the state in the statutes which it enacts, as the law making department of the state government. Where a conflict of opinion arises as to what is the policy declared by any given statute, we, as the interpreters of the law, are charged with the duty of determining that question. In such a case we do not formulate the policy, but merely find what the legislature intended it to be.
>
> It is axiomatic that the policy of a statute is to be found in the legislative intent. And it is a cardinal rule in the construction of statutes that such intent is, itself, to be found solely in the words of the statute, if they are free from ambiguity and express a sensible meaning. Bloomfield v. Brown, 67 RI 452, 25 A2d 354, 141 ALR 170. Stated in another way, where

the language of the statute is plain and unambiguous, it declares its own meaning and there is no room for construction. Hathaway v. Hathaway, 52 RI 39, 156 A 800. To illustrate the principle concretely, where a literal reading of the words of the statute, which gives them a broad or narrow or popular or technical meaning as the case may be, does not make the statute applicable to the matter before the court, we may not add words to or omit words from the statute in order to make it applicable, even though we may think that by doing so a wiser policy would be thereby promoted."

"Neither incongruity nor inequality in the dispensation of legislative grace is injustice in the legal meaning of that word. In such a matter the legislature may discriminate as it chooses. The fact that a literal reading of a statute shows that it is discriminatory is not a reason for invoking judicial construction of the statute in order to remove such discrimination."

CONCLUSION

The appellants attacked the constitutionality of the State statute as being repugnant to the Federal Constitution in the State Court and the statute was held to be constitutional against this contention by the highest Court of the State. Clearly this Court therefore has jurisdiction to review as provided by 28 U.S.C.A., 1257 (2).

Appellants further urge that in addition to reviewing upon appeal the case under the above cited authority, this Court would likewise have jurisdiction to review and determine whether or not the actions of the highest court of the state abridged the rights of the appellants. The Supreme Court of the United States certainly has jurisdiction to cure a wrong committed to individual rights

by the highest court of the state when the court denies appellants a judicial review and renders a legislative result. The case of Brinkerhoff-Faris Trust and Savings v. Hill, 281 U.S. 673, 74 L. Ed. 1107, would seem to apply to this situation.

It is therefore respectfully submitted that jurisdiction upon appeal does lie herein and that the motion to dismiss should be denied.

Respectfully submitted,

WM. S. HAWKINS
E. L. MILLER
EDW. S. FRANKLIN
Attorneys for Appellants.

No. 675. PETTY ET AL. *v.* IDAHO. Appeal from the Supreme Court of Idaho. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a final judgment. 28 U. S. C. § 1257. *Edward S. Franklin* for appellants. *Robert E. Smylie,* Attorney General of Idaho, and *William H. Bakes,* Assistant Attorney General, for appellee. Reported below: 73 Idaho 136, 248 P. 2d 218.